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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALFREDO PRIETO et al.,

Defendants and Appellants.

B233309

(Los Angeles County
Super. Ct. No. TA106590)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed as modified.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Jose Prieto.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Jesse Robles.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Jose Prieto (Jose) is the brother of Hector Prieto (Hector).¹ Appellant Jesse Robles (Robles) is their friend and fellow gang member. This appeal arises out of a robbery and triple murder committed, according to appellants, in order to raise money to bail the Prieto brothers' mother out of jail. In a joint trial, a jury found the defendants guilty of second degree robbery, and three counts of murder committed during the commission of a robbery, and also found gang enhancements true. On appeal, Jose and Robles contend: (1) The trial court erred by refusing to sever their trial from Hector's capital trial; (2) Prosecutorial misconduct during voir dire denied them a fair trial and due process; (3) The prosecution's gang expert improperly usurped the jury's function; (4) The court erroneously admitted highly prejudicial evidence of witness intimidation; (5) Instructional error requires reversal; (6) There is insufficient credible evidence to sustain the convictions; (7) Cumulative error deprived them of a fair trial and constituted a miscarriage of justice; (8) The gang enhancement should be struck because the crimes were not committed to benefit the gang; and (9) the abstracts of judgment require modification to correctly reflect the trial court's orders regarding joint and several liability for restitution and the correct firearm enhancement. We agree only that the judgment must be modified to reflect appellants' joint and several liability for restitution, and the vicarious firearm use enhancement. Otherwise, we affirm.

PROCEDURAL BACKGROUND

A third amended information charged Jose, his brother, Hector, and Robles with three counts of murder (Pen. Code, § 187, subd. (a);² counts 5–7), robbery (§ 211; count 8), and attempted murder (§§ 187, subd. (a), 664; count 9).³ As to counts 5 through 7, the information also alleged that the murders were committed during the commission of a

¹ When discussed individually, we will refer to Jose and Hector Prieto by their first names to avoid confusion.

² All further statutory references are to the Penal Code unless otherwise indicated.

³ Count 9 was subsequently dismissed pursuant to a section 1118.1 motion.

robbery (§§ 190.2, subd. (a)(17), 211, 212.5), that Hector personally discharged a handgun that caused the death of all three victims (§ 12022.53, subd. (d)), and that a principal personally and intentionally discharged a firearm that caused the death of all three victims (§ 12022.53, subds. (d) & (e)(1)). As to counts 8 and 9, it was further alleged that Jose personally used a handgun. (§ 12022.53, subd. (b).)

As to all counts, it was alleged that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) As to Robles, the information alleged that he suffered one prior conviction of a serious or violent felony (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)).⁴ All three defendants pleaded not guilty and denied the special allegations.

In early May 2010, Robles joined by Jose, moved to sever their trial from Hector’s trial on the grounds that (1) Hector had made statements to fellow gang member Jesus Saldana inculcating Robles and Jose, and Hector’s statements could not be redacted to prevent the jury from knowing that Hector referred to Robles and Jose in his statements; (2) of the three defendants, only Hector faced the death penalty; and (3) because Hector faced the death penalty, his trial preparation would take up to two years, whereas Robles and Jose could be ready for trial within 60 days of the hearing on the motion. The motion was denied. Trial was set for February 2011, but Hector’s counsel was not ready. Jose and Robles renewed their request for severance again. It was denied, and the court set a new trial date for March 1, 2011.

A jury convicted Jose, Robles and Hector as charged, and found the special allegations to be true.⁵ Robles waived jury trial on his prior strike allegation. (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i).)

⁴ Counts 1 through 4 were dismissed. (§ 1385.)

⁵ The jury convicted Hector, whose case was tried as a capital case, of the same offenses, but was unable to reach consensus as to punishment. Hector is not a party to this appeal.

Jose and Robles were each sentenced to three consecutive terms of life without the possibility of parole for each of the special circumstance murders (counts 5–7⁶), plus 25 years to life on each of those terms for the firearm enhancement. For the robbery (count 8), Robles and Jose each received the midterm of three years, plus 10 years for the gang enhancement. The court awarded presentence custody credits. It imposed various fines and fees, including a restitution fine of \$22,500 to the Victim’s Compensation Fund and restitution of \$4,118.38 to the victims’ families, to be paid jointly and severally by appellants. These timely appeals, in which Robles and Jose adopt one another’s arguments, followed.

FACTUAL BACKGROUND

On March 29, 2009, Andrew Williams, Ronald Carter and Sinecia Miller were shot to death in Williams’s apartment. At about the same time, Reginald Kemp was robbed at gunpoint in a driveway near Williams’s apartment.

The Prosecution Evidence

The defendants and the prosecution’s principal witness

The Prieto brothers live with their mother Beatrice Elias in Compton. Jose was bald in March 2009. At the time of trial, his hair was in a ponytail and he weighed 20–30 pounds more than he had in March 2009. He has a scar near his right eyebrow. Each of the defendants are members of the “Barrio 13” gang. Jose’s gang moniker is “Dopey,” Hector’s moniker is “Little Dopey” and Robles’s gang moniker is “Little Duende.”

Jesus Saldana, who was 27 years old when he testified at trial under a grant of immunity, has been a member of Barrio 13 since he was 11 years old. Saldana has known Robles since he was “a little kid,” and has known the Prieto brothers for three or four years. Saldana and his wife Mabel have five children between the ages of two and eight years old.

⁶ During trial, counts 5 through 8 were renumbered counts 1 through 4 for the jury’s benefit after the initial counts 1 through 4 were dismissed.

March 29, 2009: The crimes

Saldana, Jose, Robles and Hector were together on the morning of March 29, 2009 in the living room of the Prietos' home. According to Saldana, Jose and Hector began to discuss plans to commit a robbery to raise \$50,000 to bail their mother out of jail. During this discussion, Robles agreed to help and told Jose and Hector, "I got your back."

Saldana told the Prietos they needn't commit a robbery because he was expecting a settlement from an accident case, and would give them the money. But Hector or Jose said they couldn't wait. When Saldana left that day he planned to participate in the robbery. His wife talked him out of it because he would not receive any of the proceeds.

Rosa Avila testified that sometime after 2:00 p.m. or 3:00 p.m. that day, Jose arrived at her Compton apartment.⁷ Avila's husband is a friend of the defendants and their apartment building was a hangout for Barrio 13 gang members. Jose asked Avila's husband to drive him somewhere, but he was drunk so Avila agreed to do it. When Avila asked Jose where they were going, he said they were going to Robles's house. After Avila and Jose got into Avila's black Volvo, Hector and Robles arrived in a white pickup truck, driven by Robles. Avila asked why they needed a ride if they had Robles's truck. Jose said the truck was low on gas. Avila drove behind the truck, which stopped at a location about a block from Robles's house. They passed gas stations on the way. Avila stopped her car behind the truck. Hector and Jose each got out of the vehicles, walked toward Rosecrans and out of her sight. Robles stayed in his truck and Avila waited in the Volvo.

Andrew Williams was a marijuana dealer who sold marijuana from his apartment on East Rosecrans in Compton, from a nearby barbershop and in the driveway next to the barbershop. Reginald Kemp and Williams were friends. On March 29, 2009, at about 7:00 p.m., Kemp parked and headed to Williams's apartment with \$90 to buy marijuana, as he did about once a week. As Kemp walked toward the driveway near Williams's

⁷ Avila testified under a grant of immunity.

apartment he saw a bald male wearing a black hoodie leaning against a wall about 18 feet from the front door of Williams's apartment. Kemp later identified the man as Jose. The hood was covering Jose's head at first. As Kemp walked past Jose, he heard what he thought were four firecracker sounds or gunshots. Jose approached Kemp, pointed a chrome revolver at Kemp. Jose asked Kemp, "What do you got?" and, as he did, his hood came down for an instant. Jose grabbed Kemp's money; Kemp ran away as Jose counted the cash.⁸

Kemp sought help at the barbershop, where he told the employees and patrons he had just been robbed. One barber, who had heard three gunshots before Kemp arrived, went to a nearby apartment to check on his friends who lived there. Upon entry, the barber saw three dead bodies, later identified as Williams, Carter and Miller.

Meanwhile, Avila testified that, about five minutes after they left, Hector and Jose returned, walking briskly, to the waiting vehicles. Hector went to the truck and Jose returned to Avila's Volvo. She asked Jose what had happened. He said nothing had happened, that everything was fine and told Avila to leave, saying "Let's go." Both vehicles drove back to Avila's apartment complex. When they returned to the apartment complex, Avila saw Jose, Robles and Hector "high-fiving" several other men in a congratulatory fashion. No one gave Avila a "high five." As that was happening, Avila saw Hector take some paper money out of his pocket. She asked him where the cash had come from. Hector told her not to worry, and said he got it from "the Blacks [sic] guys."

⁸ Kemp had driven to Williams's apartment with Coty Arceneaux, who remained in the car. While she waited, Arceneaux saw a male Hispanic pacing in the driveway near Williams's apartment. The man wore plaid shorts, a white T-shirt, and a black hooded sweatshirt and had both hands in the pockets of his sweatshirt. As Kemp walked down the driveway, Arceneaux heard loud "pops" or bangs. As Kemp walked past the male Hispanic, the man walked in Kemp's direction, and Arceneaux lost sight of both of them. Moments later, she saw two Hispanic men in black hoodies run past her. One was the same man she had seen earlier who was shorter than the man. The taller man grabbed the shorter man by the jacket as they ran past. Arceneaux was unable to identify either man.

Avila went back to her apartment. She never saw blood on any defendant's clothes. Later that evening, Avila drove down Rosecrans and saw police activity and yellow tape along the street. When she got home she saw a newscast and learned three people had been killed in the area where she had seen the police activity.

On the evening of March 29, 2009, Detective Paul Fournier and other members of the Los Angeles County Sheriff's Department (LASD) arrived at the scene of the triple murder in Williams's apartment. Williams's body was lying on the ground near the front door, Carter's was a few feet away on the floor and Miller's body was slumped over a chair. One of Carter's pants pockets had been turned inside out. All three victims had been shot in the head. Miller suffered a gunshot wound that went through her wrist and another gunshot wound to the top of her head. Each victim died of a gunshot wound to the head. When he entered the apartment, Detective Fournier smelled a strong odor of marijuana, and he saw small amounts of marijuana throughout.

The public information released by the police was very general. It stated only that three people had been murdered at the scene in Compton. Detective Fournier did not recall that the police statement to the media revealed either the victims' gender or the nature of their injuries. The press release did not contain information about the number of bullets fired, the type of gun used or the nature of the injuries to Miller's wrist and head. The press release did not mention that a white truck or a black Volvo had been involved in the murders, that the suspects were male Hispanics, or that they wore black hooded sweatshirts.

Hector posted bond for his mother at 11:54 p.m. on March 29, 2009.⁹ She was released the following morning.

March 30, 2009: Hector and Jose boast; Robles remains mostly silent

Saldana was watching the news early on the morning of March 30, 2009, and saw a report of a triple murder. Fearing his friends had been killed, Saldana, his wife and

⁹ The premium for Elias's \$50,000 bail bond was \$5,000. Hector paid \$1,000, and agreed to pay the balance in installments.

their children drove to the Prietos' home where he encountered Jose and Robles sometime before 8:30 a.m. Saldana asked them what had happened. They said everything was cool. Jose asked Saldana to drive to the police station to get Hector and see if his mother had been released. Saldana dropped Jose at his girlfriend's house on the way, and took Robles to the station to meet Hector.

When Hector got into Saldana's van at the police station the television was broadcasting a news story about the triple murder. A mother was crying and asking anyone with information about her daughter's murder to call a certain phone number. Hector laughed, and began telling Saldana about the murders.

Hector told Saldana that, the night before, he had gone to the victims' apartment and knocked on the door. A man (Williams) answered. Hector asked the man for a \$20 "sack," and then shot him in the head when he turned around. Next, he shot a guy (Carter) on the couch. Then he shot a girl (Miller) who put up her hand and begged for her life. That shot went through the girl's raised hand and hit her head. Hector described all three shots as "dome" (head) shots. Hector took about \$4,000–\$5,000 and some "weed" and left the apartment. Jose was outside by the front door while Hector shot the victims, and Robles was at the corner. The gun Hector used had only three bullets. Hector showed Saldana his pants and white tennis shoes, which had a small amount of blood on them. Saldana and later, Jose, told Hector to "get rid of" his pants and shoes, but Hector said he would wash them.

Saldana drove back to pickup Jose, who began to recount for Saldana how the murders had occurred. He told Saldana he stood outside the door acting as lookout during the shootings. He wore a black hooded sweatshirt. He planned to kill anyone who tried to get inside. While outside, Jose encountered a Black man at whom he pointed a gun which would not fire; the man ran away. Robles remained silent when Hector and Jose told Saldana about the murders and robberies, and when Jose and Saldana urged Hector to dispose of his clothing. Robles told Saldana he drove his white S-10 pickup truck to the scene of the robbery and murders and parked "around the corner." Hector or

Jose said the other getaway driver was a girl in a black Volvo. Saldana did not immediately report this to the police.

The investigation

Kemp called the police and was interviewed on March 30, 2009. At that time he described the person who robbed him as a male who appeared to be no more than 16 or 17 years old, wearing plaid shorts, bald, with a tattoo on his neck and an eyebrow piercing that appeared to be infected, red and nasty, and who had acted inexperienced. Field interview cards, admitted at trial by stipulation, reflect that Jose, who was 22 years old at the time the crimes were committed, was five feet 11 inches in 2008 and weighed between 170 and 180 pounds.

On April 28, 2009, LASD deputies searched Saldana's home in the course of a neighborhood sweep. They seized a large stash (51 baggies) of marijuana. Saldana and his wife were arrested, and their children were detained by the Department of Children and Family Services (DCFS). Upset and angry about what had happened to his children and in his neighborhood, Saldana told LASD deputies he had information about the triple murders and wanted his wife released from jail. He "told them to help [him] and [he'd] help them." Saldana's wife was released from custody within 30 minutes.

Saldana was interrogated by Detectives Fournier and Caouette on April 29, 2009. The detectives immediately informed Saldana his wife had been released from custody. Saldana relayed what the defendants had told him about the robbery and triple murder. He also said a woman in a black Volvo was connected to the crimes. Saldana directed the detectives to his cell phone, which contained phone numbers for each defendant, and he identified the defendants in photo lineups. Saldana expressed concern for his family's safety and his own; as a gang member, he knew that "[i]f you snitch you die."

As a result of his April 28 arrest, Saldana was charged with possession of marijuana for sale and received a 16-month prison term. May Santos, the prosecutor on Saldana's marijuana case, testified at trial that she offered Saldana 16 months in state prison in exchange for his plea. Santos based the offer on the police report and Saldana's criminal history, and did not know Saldana was a witness in this triple murder case when

she made the plea offer. Nothing in the file for Saldana's marijuana case indicated that he was a witness in a triple murder case, and Santos believed her offer of 16 months was "definitely a harsher offer."

Apart from being relocated, Saldana testified that he did not receive any favors from the LASD or the District Attorney's office in exchange for his testimony in this case. Saldana testified that he did not "snitch" on the defendants to get his wife or children released from custody. He did not consider the fact that his wife was released from jail a "benefit," and DCFS had not returned his children to his wife's care for eight months. Detective Fournier testified that he did nothing to help Saldana's wife get released from custody, nor did he play a part in getting Saldana's children returned by DCFS.

On May 4, 2009, Detective Fournier seized a white T-shirt and a pair of tennis shoes from Hector while he was in lockup. The shirt was taken to prepare a K-9 scent discrimination lineup.

On May 5, Saldana spoke again with Detective Fournier. He told Detective Fournier that, earlier, he had run into Hector, who had not been wearing shoes. Hector told Saldana that the police had taken his shoes and his shirt, but that the shoes they took were not the ones he wore during the murders.¹⁰

Also on May 5, Detective Fournier interviewed Kemp and showed him four six-pack photographic lineups. Kemp identified Jose as the man who robbed him. Kemp was "a hundred percent" certain of his identification.

On May 6, 2009, a K-9 scent discrimination lineup was prepared using Hector's shirt, and the pants pocket of the murder victim that had been turned inside out. In the scent lineup, four boxes were placed in a specific formation, three of which contained

¹⁰ The trial court limited the testimony regarding the seized shoes to Hector. The issue resurfaced later in connection with jury instructions when the court refused Jose's request to limit a hiding evidence instruction to Hector. (See discussion in section 5 below.

scent pads from Hispanic men unconnected to the triple murder. The fourth contained Hector's scent. A dog sniffed the pocket taken from the crime scene, which was placed in the middle of the box formation and alerted to the box containing Hector's scent.

On May 12 police executed a search warrant at the Prieto brothers' home. The officers seized two hooded black sweatshirts and a pair of white tennis shoes. An LASD criminalist examined the shoes. The upper portion of the shoes appeared to have been cleaned or white polished, but the soles were dirty. Tests for blood evidence were negative; blood can be washed away.

A fingerprint analysis revealed that none of the fingerprints recovered from the crime scene belonged to any defendant.

A firearms specialist examined three bullets, one of which was recovered from each victim. All three bullets were fired from the same revolver, either a .38-caliber special or a .357-caliber magnum. A coroner testified that all three victims died of gunshot wounds to the head. As for Miller, a single bullet went through her wrist then struck her head, killing her. The coroner opined that, when she was shot, Miller's hand was most likely in front of her forehead.

An LASD detective testified as the prosecution's cell phone expert. He testified about certain phone calls made and received from cell phone number (323) 377-4216, on March 28 through 30, 2009. The calls were made to Aladdin Bail Bonds, using the same cell phone tower located near 971 West Rosecrans Avenue in Compton, which had a range of about a five-mile radius. The driving distance between that cell tower and Avila's apartment was about one-half mile.

Prosecution gang expert

LASD Deputy Salgado, a member of the gang task force in Compton, testified as the prosecution's gang expert. He testified about his qualifications as a gang expert generally, and his specific expertise as to the Barrio 13 gang. Deputy Salgado had actively gathered information on the Barrio 13 gang, which has about 115 documented members. He has spoken with hundreds of gang members, including as many as 30 members of the Barrio 13 gang. Those conversations have yielded useful intelligence,

including the gang's tattoos, hand signals, graffiti and information about criminal acts the gang commits. Deputy Salgado has been involved in hundreds of investigations involving gang members, including about 30 involving Barrio 13 gang members. Deputy Salgado explained that the "13" in Barrio 13 is significant in gang culture because it signifies the gang's association with the Mexican Mafia. Deputy Salgado is familiar with Jose, Robles and Hector, all of whom are members of Barrio 13 and have gang tattoos and monikers. Jose and Robles were active members of the gang on March 29, 2009.

When Deputy Salgado was first assigned to the Compton station, Barrio 13 was not a Compton gang. Recently, however, the gang had committed a "spike" of crimes in the area of 137th Street and Wilmington in Compton because it was "claiming" the area on the north and south of those streets. That was one reason Deputy Salgado and his partner had been charged with targeting Barrio 13 in that area. Gang members claim territory by, among other things, committing crimes and conducting drug sales within the territory. Barrio 13's gang territory was "offset" in Compton, where they claimed that territory as their own. "[O]ffset" territory means areas the Barrio 13 gang had recently claimed as their own. Since gangs claim territory unilaterally, there are frequent border disputes among rival gangs. The crimes in this case took place on the 1200 block of East Rosecrans which had, historically, been another gang's territory.

Deputy Salgado testified that the primary activities in which members of the Barrio 13 gang engage are vandalism, thefts, criminal threats, robberies, assaults, burglaries, shootings, murder and attempted murder. Deputy Salgado based his professional opinion on his involvement in investigations involving Barrio 13 gang members. The prosecutor presented Deputy Salgado with certified documents pertaining to predicate acts, or prior convictions of members of the Barrio 13 gang, including an attempted murder by a gang member in July 2005, and robberies committed by another member of the gang in October 2007.

Gang members "put in . . . work" and gain status by committing such crimes. The more violent the crime, the more status gained. Murder is the ultimate crime a gang member can commit, and will result in the member's status "go[ing] . . . all the way to the

top” within the gang. Deputy Salgado explained that gang members want to be feared because it gives them heightened status, reputation and more respect from the gang. Crimes, especially those committed openly by a group, instill fear in the community and generate respect for the gang. That is why gang members who commit such crimes don’t wear masks. Crimes are committed in broad daylight to instill fear within the community, which in turn helps deter members of the community from reporting crimes for fear of retaliation.

Deputy Salgado opined that gang members work together to commit crimes for several reasons. First, they work together in groups of two to six gang members to commit crimes because it creates “fear by numbers” and intimidation. Second, working in a group creates witnesses, so someone can report back to the gang that a crime was in fact committed. Third, it is easier to commit the crime working in a group because different gang members can perform different roles such as lookout, or driver.

The prosecutor presented Deputy Salgado with a hypothetical explicitly patterned on the facts of this case. She designated the role of each defendant and gave them the fictional names Larry, Moe and Curly, respectively. Deputy Salgado opined that Larry, Moe and Curly were gang members acting in association with one another, and were “aiding and abetting each other” in committing the crimes. He also testified that, in his opinion, the triple murder and robbery were committed to benefit the gang because, having committed the most violent crime of murder, Larry’s status within the gang would be elevated to the top. So too for the lookout (Moe) and getaway driver (Curly). The gang members’ reputations would increase and they would be known as violent members of the gang. The gang also benefited from the crimes because it gained prestige and respect, and garnered a reputation for violence which, in turn, instilled fear within the community. The fact that the victims had been shot in the head would cause rival gangs and the community to fear the Barrio 13 gang even more.

“Moe’s” role as lookout benefited his own status within the gang, and the fact that he talked about his participation in the crime increased his and the gang’s reputation. “Curly’s” actions as a getaway driver benefited the gang and himself, because it showed

he was not afraid to commit crimes. The fact that Larry, Moe and Curly spoke openly about their crimes demonstrated how the gang “publicize[d]” their crimes. Curly served an important function as a witness to the crimes who could verify the actions of Larry and Moe.

The Defense Evidence

None of the defendants testified.

In October 2010, Saldana was arrested for carjacking. He told the deputy who arrested him he was a witness in a triple murder case. The deputy contacted Detective Fournier and, for his safety, Saldana was placed in a separate housing unit. Otherwise, the deputy was not told to “go easy” on Saldana or to give him any special treatment. The LASD deputy who brought Saldana’s file to the district attorney believed he told the prosecutor that Saldana was a witness in this case, but did not specifically recall having done so.

Detective Gomez had interviewed Saldana after he and his wife were arrested in April 2009 for possession of a large quantity of marijuana. Saldana told Detective Gomez he was a witness in a triple murder case and asked that his wife be released from custody, and that DCFS return his children. Saldana did not tell Detective Gomez that he would testify only if his wife and children were released or if the charges against him were reduced, and sought no benefit in exchange for information about the murders. Even though Saldana had information about the murders, Detective Gomez still requested that he be charged with felony possession of marijuana for sale. Detective Gomez released Saldana’s wife even though she admitted possession of the marijuana, and knew Saldana had been selling it from their home and using the money to buy food and other items. Detective Gomez did not release Saldana’s wife in exchange for Saldana’s testimony regarding the three murders, and he did not call DCFS to return Saldana’s children.

Defense gang expert

Humberto Guizar, a civil rights and personal injury attorney, testified as the defense gang expert. Guizar is a former gang member, who has testified before as an

expert on criminal street gangs and regularly lectures on criminal street gangs and the gang enhancement statute. He reviewed police and investigative reports, the preliminary hearing transcript in this case, Deputy Salgado's testimony and met with Hector in custody.

Defense counsel provided Guizar with a hypothetical factual scenario patterned on the evidence in this case, and asked him if the attempt to steal money to bail out the hypothetical mother had been committed for the benefit of, at the direction of and in association with a gang. Guizar opined that the crimes committed in the hypothetical were not gang crimes. On the facts stated, Guizar opined that if the mother was not an active gang member, it was not a gang crime. Not everything a gang member does is a gang crime. Guizar opined that the crime was committed in order to get the mother released from custody.

DISCUSSION

1. Trial court's refusal to sever appellants' trials from Hector's trial

Appellants contend the trial court's refusal to sever their trial from Hector's trial violated their constitutional rights because: (1) admission of Hector's confession violated the principles of the *Aranda/Bruton*¹¹ line of cases; (2) the spill-over effect generated undue prejudice; and (3) delaying their trials in order to accommodate the trial preparation needs for Hector's capital murder trial deprived them of their right to a speedy trial.

a. Legislative preference for joint trials and legal standards for severance and review

"Defendants 'charged with common crimes involving common events and victims'" [typically] present a "classic case" for a joint trial. [Citation.] (*People v. Tafoya* (2007) 42 Cal.4th 147, 162 (*Tafoya*)). The Legislature strongly prefers joint trials: "When two or more defendants are jointly charged with any public offense,

¹¹ *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (*Bruton*).

whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.” (§ 1098; *People v. Souza* (2012) 54 Cal.4th 90, 109 (*Souza*).) Joint trials promote judicial economy and efficiency and avoid inconsistent verdicts. (*Zafiro v. United States* (1993) 506 U.S. 534, 537, 540 [113 S.Ct. 933, 122 L.Ed.2d 317].) Despite the preference for joint trials, a trial court may grant a request for a separate trial. Such a trial is appropriate “in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.” (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted.)

““We review a trial court’s denial of a severance motion for abuse of discretion based upon the facts as they appeared when the court ruled on the motion.’ [Citations.] ‘If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial.’ [Citations.] ‘If the court’s joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder ““resulted in “gross unfairness” amounting to a denial of due process.”” [Citations.]” (*Souza, supra*, 54 Cal.4th at p. 109; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 343 (*Greenberger*).)

The principal factors to be considered in determining whether severance is in order are: “(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case.” (*People v. Marshall* (1997) 15 Cal.4th 1, 27–28; *People v. McKinnon* (2011) 52 Cal.4th 610, 630 (*McKinnon*).) A finding that the evidence is cross-admissible ordinarily dispels any inference of prejudice. (*Marshall*, at p. 28.)

b. The trial court did not abuse its discretion: Greenberger and Cervantes control

Notwithstanding the *Aranda/Bruton* rule, a codefendant's statements inculcating a defendant in the same case may be admissible against the defendant. (*Greenberger, supra*, 58 Cal.App.4th 298 at p. 334; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174–175 (*Cervantes*).) *Bruton* does not stand for the wholesale proposition that “all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial.” (*Greenberger*, at p. 332.) In *Greenberger*, the court found that statements by a codefendant which incriminate a nondeclarant defendant may be admissible against the defendant if the statements fall within a hearsay exception, and the reliability of the statements has been shown. A “declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness.” (*Id.* at p. 334.) To make this determination, the court looks to “the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge,” the declarant's possible motivation, what the declarant actually said and whatever else is relevant to the inquiry. (*Ibid.*)

Greenberger, supra, 58 Cal.App.4th 298 was followed in *Cervantes, supra*, 118 Cal.App.4th 162. *Cervantes* found that a codefendant's (Morales) statements to a friend, in which he implicated himself and codefendant Cervantes were not testimonial under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] because it was unlikely that Morales had reasonably anticipated his statements would be repeated in court. (*Cervantes*, at p. 174.) Morales, who was injured, sought medical aid from a long-time friend and medical assistant, Dolores Ojeda. He told Ojeda he had been hurt jumping fences after he and a third codefendant (Martinez) and Cervantes detained two men and shot them. Morales said he shot one of the men, and he and Cervantes shot the other one. (*Id.* at pp. 166–167.) At trial, Morales's statement was introduced through Ojeda against Cervantes and Martinez. Morales, who did not testify, was not subject to cross-examination.

To determine the admissibility of Morales's statement against his codefendants, the *Cervantes* court analyzed whether the statement fell within a hearsay exception or bore sufficient indicia of reliability. (*Cervantes, supra*, 118 Cal.App.4th at p. 174.) The court found Morales's statement implicating his codefendants to be trustworthy because Morales made it within 24 hours of the shooting, and made it to a longtime friend whom he sought out to treat his injuries. (*Id.* at p. 175.) Moreover, the statement was against his penal interest and nothing in it rendered him a sympathetic participant in the crime. (See *Greenberger, supra*, 58 Cal.App.4th at p. 335 [most reliable circumstance is where the conversation occurs between friends in a noncoercive setting].)

The circumstances here track those in *Cervantes, supra*, 118 Cal.App.4th 162, and Hector's statements exhibit an equivalent degree of reliability. First, Hector's statements were against his penal interests. (Evid. Code, § 1230.) Second, all three conversations relayed by Saldana occurred within hours of the commission of the crimes. The first conversation took place on the morning of March 29, 2009, the second conversation about 12 hours after the murders and the third a few hours later on March 30. Third, all three conversations occurred among friends and fellow members of the Barrio 13 gangs in a noncoercive setting. None of the challenged statements was exculpatory, placed the speaker in a sympathetic light or attempted to place blame on anyone else. In the first of two conversations on March 30, Hector laughingly told Saldana he shot three people in the head inside the apartment, one of whom had begged for her life.¹² Hector never minimized his own conduct or attempted to shift responsibility to anyone. He pointed the finger of blame directly at himself and accepted complete responsibility for the murders. Fourth, the challenged statements were reliable because Saldana revealed details about

¹² Jose points out that he was not present for this conversation, which cannot be deemed an adoptive admission as to him. Nevertheless, the information relayed by Hector to Saldana during that discussion was corroborated by Jose's own statements to Saldana in a conversation that took place in the presence of all three defendants a short time later.

the murders (e.g., the number of bullets fired, the fact that the female victim begged for her life and raised her hand to protect her face, and the fact that Hector took marijuana from the victims' apartment), not released publicly and which he could only have learned from Hector and/or appellants. The trial court did not err in finding the statements were sufficiently trustworthy under *Greenberger, supra*, 58 Cal.App.4th 298 and *Cervantes, supra*, 118 Cal.App.4th 162.

Appellants assert that severance was in order because the spillover effect of trying their cases along with Hector's capital case caused undue prejudice. "Denial of a severance motion may be an abuse of discretion if the evidence related to the joined counts is not cross-admissible; if evidence relevant to some but not all of the counts is highly inflammatory; if a relatively weak case has been joined with a strong case so as to suggest a possible "spillover" effect that might affect the outcome; or one of the charges carries the death penalty." [Citations]" (*McKinnon, supra*, 52 Cal.4th at p. 630.)

Cross-admissibility concerns whether evidence on each of the joined charges would be admissible in separate trials under Evidence Code section 1101. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315–1316.) Here, with the exception of the robbery count as to Kemp, Hector and both appellants faced equivalent charges with common victims. The vast majority of the evidence, including the challenged extrajudicial statements, was cross-admissible to prove the defendants' motive, intent, planning, participation or common design. The evidence was also admissible to prove the gang enhancement allegations. Had appellants' trial been severed from Hector's, both trials would have proceeded involving virtually identical evidence. The severity of the charges also favored a joint trial. Separate trials would pose an enormous burden on the courts, the prosecutor and the witnesses in conducting multiple trials involving the same evidence. Cross-admissibility is only one of several factors to be considered in determining whether severance is proper. (*McKinnon, supra*, 52 Cal.4th at p. 630.) But, "[c]ross-admissibility is the crucial factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) If the evidence on each charge would be admissible in a separate

trial of the others, no prejudice results from their joinder. (*People v. Cunningham* (2001) 25 Cal.4th 926, 985; *People v. Bradford*, at pp. 1315–1316.)

As far as inflaming the jury, Hector’s gratuitous, execution-style murder of three individuals was unquestionably heinous. But, the special circumstances murders of which appellants were accused were themselves quite egregious and a jury reasonably could find them as despicable as it would have if it considered evidence of those crimes separately.

Considering the relative strength and weakness of the cases, Jose argues the evidence against him was weak, and Robles contends the evidence against him was even weaker. The record reflects otherwise. Jose focuses solely on disparities in Kemp’s description of his robber shortly after the incident and several weeks later when he identified Jose in a photo lineup. But our function is not to reweigh evidence. The jury assessed Kemp’s credibility, determined what weight to give his testimony and resolved any inconsistencies between his pretrial identifications of Jose and his trial testimony. Appellants merely reargue the issue of the credibility of Kemp’s eyewitness identification, and inferences raised by that evidence. But “““it is the exclusive province of the . . . jury to determine the credibility of witnesses and the truth or falsity of the facts upon which a determination depends.””” (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) “Weaknesses and inconsistencies in eyewitness testimony are matters solely for the [trier of fact] to evaluate.” (*People v. Allen* (1985) 165 Cal.App.3d 616, 623; *People v. Ford* (1981) 30 Cal.3d 209, 215.) At the time Kemp made the photo identification of Jose, he maintained that he was “a hundred percent certain” Jose had been the man who robbed him. That testimony, standing alone, was sufficient to sustain Jose’s conviction on the robbery count. (*People v. Panah* (2006) 35 Cal.4th 395, 489 [uncorroborated testimony of one witness unless physically impossible or inherently improbable is sufficient to sustain conviction]; CALCRIM No. 301.)

In addition, appellants ignore Avila’s testimony, which placed each of them in vehicles headed to and from the immediate vicinity in which the crimes occurred, highlighted the haste with which Hector and Jose returned to the waiting vehicles and

desired to leave the area, and their return to the gang hangout where Hector, Jose and Robles exchanged congratulatory greetings with other gang members and Hector pulled out a large amount of cash which he claimed to have gotten from “the Black[] guys.”¹³

Finally, although the prosecution sought the death penalty only as to Hector, this action qualified as a special circumstances case against appellants, as murders committed in the course of a robbery. (§ 190.2, subd. (a)(17)(A).) Appellants contend that, as noncapital defendants they should not have been tried with Hector, a capital defendant. The California Supreme Court has rejected this argument. In *Tafoya, supra*, 42 Cal.4th 147, the court reasoned that both it “and the United States Supreme Court have upheld the practice of conducting joint trials of defendants eligible for the death penalty with those who are not.” (*Id.* at pp. 163–164.) And, although denial of appellants’ motion significantly delayed their trial date, appellants failed to show the delay was unjustified. If the precipitating cause is justified, the legislative preference for joint trials constitutes good cause to delay the trial of an objecting codefendant. (*People v. Sutton* (2010) 48 Cal.4th 533, 562.) Here, trial proceeded within a year after appellants’ motion to sever was denied in May 2010. As respondent observes, appellants fail to argue, let alone demonstrate, that the length of that delay was not commensurate with the complexity of the case, the seriousness of the capital murder charge or the need to coordinate all the lay and expert witnesses who testified at trial.

For these reasons, we find the trial court did not err by denying severance.¹⁴

¹³ If the jury believed Avila was an accomplice, her testimony alone would have been insufficient to sustain a conviction. (§ 1111 [“A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense”].) The jury was so instructed.

¹⁴ Having found that appellants suffered no undue prejudice from the court’s decision to proceed with joint trials, we must also consider whether despite the correctness of that ruling, the joinder such that it ““““resulted in “gross unfairness” amounting to a denial of due process.”” [Citations.]” (*Souza, supra*, 54 Cal.4th at p. 109; see also *People v. Soper* (2009) 45 Cal.4th 759, 783 [upon determination that trial

2. *Appellants forfeited their claim of prosecutorial misconduct*

During voir dire, one of the prosecutors (Ostrowski) examined several potential jurors who expressed discomfort with the principle that the testimony of just one witness is sufficient to support a conviction. During a break in the proceedings following the prosecutor's questioning on the one witness rule, the trial court asked Ostrowski, "are any of the People's witnesses going to be argue [sic] the accomplices?" and reminded her the rule would not apply "if the one witness were an accomplice." The court sought an assurance that there were "no accomplice issues" in this case. Ostrowski replied that she "[didn't] believe so," and later assured the court, "It's not an issue in our case." Voir dire continued and Ostrowski examined three more potential jurors regarding their discomfort with the rule.

Before the preliminary hearing the prosecution had given Avila, potentially one of two getaway drivers, immunity from prosecution in exchange for her testimony against the defendants.

The trial court became aware that Avila would testify under a grant of immunity after the prosecution's case-in-chief was underway. The court chastised Ostrowski for having represented during voir dire that no accomplice issues would arise at trial. The court noted that Ostrowski had "firmly implanted with the jury the idea that one witness is sufficient," and then left it to the court to "unring the bell" with a jury instruction after learning, belatedly, that Avila had been given immunity.¹⁵

court's ruling on severance motion was correct at the time it was made, appellate court must still determine whether the joinder of defendants or counts for trial was so grossly unfair as to deprive defendant of due process[.]) Our review of the record convinces us that the failure to sever the trials did not result in gross unfairness.

¹⁵ This exchange took place:

"The Court: . . . It's just like when we were in voir dire and you all were questioning about the one witness rule and I asked you whether there are any possible accomplices here and you told me no and now you just put on a witness that I'm probably going to have to give the accomplice instruction on.

Appellants maintain Ostrowski committed misconduct and poisoned the jury from the outset, and court could not deliver an effective antidote by giving a curative jury instruction at the close of trial. As a result, they claim to have been deprived of a fair trial and due process. Defense counsel did not raise any objection to Ostrowski's questions during voir dire regarding the "one witness" rule, nor did they ask the court to admonish the jury.¹⁶

"Ms. Ostrowski: Your Honor, that certainly was not an intentional misrepresentation to you. It's perhaps, a disagreement about whether or not that witness qualified as an accomplice.

"The Court: Well, you gave her immunity. It's certainly a jury issue. [¶] . . . [¶] . . . She goes on a trip following people five miles and she says that she did it because they were out of gas. [¶] . . . [¶] . . . She has no concerns about the fact that they don't stop for gas.

"Ms. Ostrowski: I understand that. But my point to you, Your Honor, is that I was not intentionally misrepresenting to the court whether I made a statement or not.

"The Court: Well, it's carelessness. I mean, just reading your memos I had an impression that [Avila] was going to be a witness and there would be this issue. That's why I wanted to intervene in it and tell the jury there are exceptions and—this is a general rule but there are exceptions, for example, accomplices. [¶] And I got a firm representation that there was no possible accomplice issue on any of your witnesses. [¶] And, you know, if you wanted to hedge your bets you should have told me, well, we have a possible issue about that. [¶] But, you know, any time you give immunity to somebody under situations raising arguments that the defense could have it's going to be a jury issue. [¶] . . . [¶] I'm not saying she is but I'm just simply saying the instructions—I've got to look at whether the jury could find that. [¶] I haven't foreclosed the issue that maybe I will find that she's not but certainly, you know, when you're talking about what could be discussed in front of a jury and voir dire and so forth it seems to me you ought to err on the side of caution because what you did you firmly implanted with the jury the idea that one witness is sufficient for any finding of a fact if they believe the witness on that fact and so, you know, I'm now going to have to try to unring the bell."

¹⁶ The record reflects that trial counsel for each appellant also represented that appellant in pretrial proceedings. It does not appear that Ostrowski was involved in prosecuting this action before January 2011. Prior to that time, the matter was apparently handled by prosecutors Magno (the other prosecutor at trial) and Aguilar (who did not participate in the trial). The preliminary hearing was held in October 2009. We presume

Respondent contends appellants' claims of prosecutorial misconduct are forfeited. Appellants maintain that no objection or request for a curative instruction was necessary because the trial court was well aware that "the prosecutor's one-witness preconditioning of the jury during voir dire would be incorrect if there were accomplice issues." They argue their failure to object should be excused because such a request would have been futile, and because of the importance of the rights at stake.

The general rule is that a claim of prosecutorial misconduct may be reviewed on appeal only if the defendant makes a timely objection at trial or asks the trial court to admonish the jury to disregard the prosecutor's improper question or statement. (*People v. Cook* (2006) 39 Cal.4th 566, 606.) As with most rules, there are exceptions, aptly summarized in *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13. As pertinent here, *Hill* states that, a "defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct." [Citations.]" (*Id.* at p. 820.) The futility exception has been limited to cases of severe and repeated prosecutorial misconduct. (See *People v. Arias* (1996) 13 Cal.4th 92, 159–161; *Hill*, at p. 821 [constant barrage of prosecutor's unethical conduct made additional attempts to object "futile and counterproductive to [the] client"].)

A "ritual incantation" of futility is not sufficient. We will grant relief from a forfeiture only where a defendant affirmatively demonstrates that an objection or admonition would have been futile or the nature of the misconduct was incurable. (*People v. Panah, supra*, 35 Cal.4th at p. 462.) Neither criterion is present here.

counsel reviewed the preliminary hearing materials (which are not part of the appellate record) in preparation for trial.

On this record we conclude that a defense objection or request for admonition would readily have reinforced for the jury their duty to follow only the court's instructions on the law. The court's questions and comments to the prosecutor demonstrate its concern that the accomplice issue would be implicated by Avila's testimony. Thus, the court specifically sought—and received—Ostrowski's assurance that no accomplice issues would arise at trial. This record makes plain that, had the defense raised a red flag and objected to or requested an admonition regarding the prosecutor's improper comments during voir dire, the court surely would have sustained the objection or given an admonition. Counsel chose not to do so. Appellants' failure to object cannot be excused on grounds of futility. (See *Hill, supra*, 17 Cal.4th at p. 820.) Appellants do not even address their failure to request an admonishment, nor do they address any exception to the general rule requiring such a request.

Here, any harm could have been cured by an admonition; appellants' claim of prosecutorial misconduct has not been preserved for appeal. (*People v. Cook, supra*, 39 Cal.4th at p. 606.) We also decline to exercise our discretion to reach a forfeited issue (See *Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 584, fn. 2, 589), as we discern no miscarriage of justice resulting from the forfeited issue because the trial court's instructions cured any possible misconduct.¹⁷

3. *Gang expert—usurpation of jury's function*

During direct examination the prosecutor asked its gang expert Deputy Salgado to assume there were three Barrio 13 gang members, Larry, Moe and Curly. The prosecutor

¹⁷ The court instructed the jury that, if you “believe that the attorneys’ comments on the law conflict with my instructions you must follow my instructions.” The jury was further instructed that “[b]efore you may consider the statement or testimony of Rosa Avila as evidence of the crimes charged against the defendants you must decide whether Rosa Avila was an accomplice to those crimes,” and “[e]xcept for the testimony of Rosa Avila, if you find she was an accomplice and thus requires supporting evidence, the testimony of only one witness can prove any fact.” (Italics added.) We presume jurors are intelligent people capable of understanding the court's instructions and applying them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

posed a lengthy hypothetical that virtually tracked the evidence presented at trial,¹⁸ and asked the expert whether the three men in the hypothetical had acted in association with

¹⁸ The prosecutor presented this hypothetical:

“Q: Assume that there are three Barrio 13 gang members named Larry, Moe and Curly. [¶] Assume that one day in 2009 all three were at Larry and Moe’s residence. [¶] Assume that while at this residence Larry and Moe, who were both brothers, talked about committing a robbery to raise money to bail their mother out who had just gotten arrested the day before. [¶] Assume that during this conversation about committing a robbery Curly said to Larry and Moe that he was going to back them up. [¶] So Curly indicated he was going to back them up. [¶] Assume that a fourth Barrio 13 gang member named Sammy was present during this conversation. [¶] Assume that Sammy, after hearing that Larry and Moe needed money to bail their mother out, offered to give either Larry or Moe the money they needed for bail. Assume that at that time Sammy was expecting a settlement check from a car accident that he was involved in. [¶] Assume that either Larry or Moe declined his offer saying they cannot wait. [¶] Assume that later on that night Larry, Moe and Curly drove to Compton and parked around the corner from the apartment of Bob, a local marijuana dealer who sold marijuana from his home. [¶] Assume that while Curly remained in the car Larry and Moe got out and walked towards Bob’s apartment. [¶] Assume that while Moe stood outside the apartment acting as a lookout Larry walked up to the apartment and knocked on the door. [¶] Assume that Bob opened the door for him and after opening the door for Larry[,] Larry then asked for . . . twenty dollars worth of marijuana. [¶] Assume that Bob then turned around presumably to retrieve the marijuana that he was going to be selling to Larry. [¶] Assume that at that time Larry then took out a gun and shot Bob once in the back of the head. [¶] Assume that Larry then immediately turned to the other male in the living room and shot him once in the head. [¶] Assume that Larry then turned to the third person in the room. [¶] Assume that the third person was a woman who at that point started begging for her life. [¶] Assume that Larry then paused but decided to shoot her once in the head as she held her hands up. [¶] Assume that the bullet went through her hand then through her head killing her. [¶] Assume that after all—that after shooting all three victims Larry gathered all the marijuana and cash he could find even going through the pants pocket of the second victim that he had shot. [¶] Assume that Larry took approximately four to five thousand dollars total in cash. [¶] Assume that at the same time Larry was doing all these things[,] Moe stood outside Bob’s apartment acting as a lookout[,] later on admitting that he was trying to shoot anyone who was going to walk up. [¶] Assume that as Moe stood there a man did start to walk towards Bob’s apartment but that before this man made it to Bob’s front door Moe took out the gun he had with him, pointed it at the man and tried to shoot but the gun would not shoot. [¶] Assume that Moe then just grabbed the money this man had in his hand that he was going to use

one another based on their gang membership. Deputy Salgado said they had, and explained the bases for his opinion. Deputy Salgado also testified that the triple murder and robbery benefited the gang, and that a particularly violent crime like shooting victims in the head would elevate the gang's prestige and reputation for violence, which in turn would generate more fear within the community—which would be less likely to report crimes to the police—and rival gangs. Larry's status, as the shooter, would be elevated to the top, and he would be known as a violent member of the gang. Moe, the lookout, would also benefit by talking about his participation in the crimes which, in turn, increased his gang's status. Curly's actions as the getaway driver benefited himself and the gang both by showing he was not afraid to commit crimes and because he was able to vouch for what Larry and Moe had done. The fact that all three men spoke openly about the crimes showed how the gang and its members willingly publicized crimes.

to pay for the marijuana. [¶] Assume that Larry then came out of the apartment and along with Moe ran back to the two cars waiting around the block. [¶] Assume that Curly was the second driver and that he drove—that himself and a second driver drove all four of them away in the two cars. [¶] Assume that all three got away from the location before deputies from the sheriff's department responded. [¶] Assume that after driving away from the location the three, Larry, Moe, and Curly, were seen high-fiving each other; however, none of them high-fived the second getaway driver. [¶] Assume that all three, Larry, Moe and Curly, then went to Aladdin Bail Bonds that night, that all three, Larry, Moe, and Curly, went there and the next day went together to pick up Larry and Moe's mother and that all three the following afternoon went to Aladdin again with Larry and Moe's mother because she had to go back and have her photograph taken for Aladdin Bail Bonds. [¶] Assume that Larry and Moe used only a thousand dollars out of the four to five thousand dollars to bail their mother out. [¶] Assume that the next day Larry admitted to Sammy what each of them did in the presence of Curly. [¶] Assume that just before Larry stated talking about what he did a news broadcast came up in which the female victim's mother was shown crying and pleading for anyone who hears anything about the murders to call the police. [¶] Assume that Larry reacted to this by laughing. [¶] Assume that Moe admitted to being the lookout and trying to shoot anyone who walked up and to actually trying to shoot one person who did walk up but was unable to do so because his gun would not shoot. [¶] Assume that Curly also admitted what he knew the others did while he was in the car waiting.”

Appellants complain that the prosecutor's hypothetical was improper, because it too closely tracked the evidence. They maintain that the gang expert improperly usurped the jury's factfinding function and the prosecutor elicited an improper opinion on defendants' subjective intent and guilt, the ultimate issue in the case.

Respondent asserts that appellants have forfeited this argument by failing to raise specific objections to the expert opinion evidence. We disagree. Twice Robles's attorney objected on the ground of "legal conclusion" when the prosecutor attempted to solicit Deputy Salgado's opinion as to whether Larry, Moe and Curly aided and abetted one another in committing a robbery. Twice that objection was sustained. We presume the bases for the objections were apparent to the seasoned trial judge. Counsel's objections were sufficient to preserve the issue for review. We also reject respondent's assertion that Jose forfeited his right to assert error for failing to join the objections at trial. It was unnecessary for him to interpose a redundant objection to the sustained objections.

We review a challenge to the trial court's admission of expert testimony for an abuse of discretion. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) No abuse of discretion occurred here.

Appellants' claim fails on the merits. Their claim that the hypothetical too closely tracked the evidence at trial was recently rejected in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*).¹⁹ In *Vang*, as here, the "'only apparent differences between the trial testimony and the hypothetical were the names of the parties.'" (*Id.* at p. 1045.) *Vang* rejected the assertion made here, reasoning, "It is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence." (*Id.* at p. 1041.) The reason for this rule is apparent. "A hypothetical question not based on the evidence is irrelevant

¹⁹ *Vang, supra*, 52 Cal.4th 1038 was still under review when appellants' opening briefs were filed.

and of no help to the jury.” (*Id.* at p. 1046.) As applied in *Vang*, the court found “this rule means “that the prosecutor’s hypothetical questions had to be based on what the evidence showed these defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether these defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury.” (*Ibid.*, italics omitted.)

So too here. The gang expert “properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the [crimes], if the jury found [they] in fact occurred, would have been for a gang purpose.” (*Vang, supra*, 52 Cal.4th at p. 1048.) Appellants’ contention that the hypothetical was improper thus fails.

Appellants’ assertion that Deputy Salgado, in answering the hypothetical questions, improperly rendered an opinion on appellants’ subjective intent, fares no better. Expert testimony regarding the culture, habits, and psychology of gangs is permissible. Courts have long held that these subjects are sufficiently beyond common experience that expert opinion may assist the trier of fact. (*Vang, supra*, 52 Cal.4th at p. 1044; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512–1513 (*Garcia*); *People v. Valdez* (1997) 58 Cal.App.4th 494, 506 (*Valdez*).) An expert may properly testify about the size, composition or existence of a gang; the motivation for a particular crime; whether a crime is gang-related; and ““whether and how a crime was committed to benefit or promote a gang.”” (*Garcia*, at p. 1512; *Vang*, at pp. 1049–1050, fn. 5; *People v. Albillar* (2010) 51 Cal.4th 47, 63 (*Albillar*); *Valdez*, at p. 509.) An expert’s testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Evid. Code, § 805; *Vang*, at p. 1048; *Valdez*, at p. 507.) But an expert “may not testify that an individual had specific knowledge or possessed a specific intent.” (*Garcia*, at p. 1513; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658, disapproved on other grounds by *Vang*, at pp. 1047–1049.)

At the end of the prosecution’s hypothetical, Deputy Salgado opined that Larry, Moe and Curly were gang members acting in association with one another and were “actually aiding and abetting each other” in committing the robberies. Defense counsel’s

objections to two follow-up questions posed to Deputy Salgado by the prosecutor,²⁰ were sustained as seeking “legal conclusion[s].” Deputy Salgado opined that the crimes were intended to benefit the gang because, having committed murders, the most violent crime, Larry’s status went up, as did Moe’s as lookout, and Curly’s as getaway driver. Appellants insist that the device of substituting the names of the Three Stooges for defendants’ names did not fool the jurors, who knew exactly who the prosecutor was identifying and what Deputy Salgado meant. They maintain the resolution of disputed facts and the perpetrators’ intent were questions for the jury and that the expert usurped its role.

Deputy Salgado opined that the crimes benefited the Barrio 13 gang because, the fact of the murders and their particularly violent nature, bolstered its reputation and inspired fear in the community and among rival gangs. Deputy Salgado did not opine about appellants’ knowledge or subjective intent. He merely described how, in his expert opinion, the crimes benefited the gang as a whole, and individual gang members. This was not improper. As *Vang, supra*, 52 Cal.4th 1038 explained, “‘Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support . . . section 186.22, subdivision (b)(1), gang enhancement.” (*Id.* at p. 1048.) Likewise, “[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a [] criminal street gang’ within the meaning of section 186.22[, subdivision] (b)(1).” (*Albillar, supra*, 51 Cal.4th at p. 63.)

People v. Hernandez (1977) 70 Cal.App.3d 271, on which appellants rely, does not assist them. In *Hernandez*, a police officer opined that a defendant’s conversation with several individuals was a drug transaction because of the way the individuals maintained their focus on defendant’s hands while they spoke, and the fact that defendant

²⁰ Specifically: “Q. And do to believe by actually aiding and abetting—” and “Q. Were they aiding each other in committing the crime of robbery?”

shook his head, as if to say he was out of drugs when approached by other people. (*Id.* at p. 281.) The court found the “officer was no more expert than the jurors concerning the significance of the fact that the four persons kept looking at the area where defendant had his hands. Nor did the officer’s expertise add any probative value to defendant’s shaking of his head from side to side when he was approached by two other persons.” (*Ibid.*) Here, by contrast, Deputy Salgado did not offer comparable testimony regarding appellants’ knowledge or intent. The prosecutor’s use of a fact-specific hypothetical did not convert Deputy Salgado’s answers into an improper opinion regarding either appellant’s state of mind. (*Vang, supra*, 52 Cal. 4th at p. 1047 [disapproving *Killebrew* to the extent it is read as “barring, or even limiting, the use of hypothetical questions”].)

4. Admission of evidence of witness intimidation

Appellants argue the trial court erred by admitting “highly prejudicial evidence” of threats of violence made against Avila by three unknown men. They insist there was no evidence they were connected to the threats and that, even if the evidence was relevant, it was highly inflammatory and its prejudicial value outweighed its relevancy. They argue the evidence should have been excluded under Evidence Code section 352, and that the court’s failure to do so deprived them of a fair trial. Respondent maintains appellants forfeited this argument by failing specifically to challenge the evidence at trial on section 352 grounds or, in the case of Robles, failing to challenge it at all.

a. Relevant facts

When Avila began to testify about an assault and threat in her home in 2009, Jose’s attorney made a relevance objection, which was overruled. The court granted a sidebar. During that colloquy, Jose’s counsel objected to Avila’s testimony on multiple grounds, including hearsay, due process and the right of confrontation, arguing there was no nexus between Jose and the threats.²¹ The court overruled the objections but, before

²¹ Hector’s counsel joined Jose’s objections “based on all of the objections made behind the federal and state constitution[s].” Robles did not join the objections.

Avila resumed testifying, instructed the jury that the evidence of intimidation was relevant to evaluating Avila's credibility, not for the truth asserted.

Avila then testified that, after she spoke to the police, she was home alone one day in May 2009 when three unknown Hispanic men knocked on her door and forced their way inside her home. One man asked her, "what happened to Dopey?" then pushed her onto the couch and smeared hair removal cream over her face. They held her down, kept her from removing the cream, and warned her not to talk about the shooting incident to the police. They told her that, if she said anything, "they were going to do something to [her] kids and [her] husband." One man told her not to move away "or this is going to happen to you," and moved his finger across his throat mimicking a slicing motion. When they left, the men told Avila to stay quiet if she wanted to live.

Avila believed the men were members of the Barrio 13 gang, members of which often visited her apartment complex. The men forced Avila to keep the hair removal cream—which is typically left on for two or three minutes on her face for 10–15 minutes; it burned her skin. This stipulation was read to the jury: "[O]n May 26, 2009, Rosa Avila reported the May 23, 2009 incident involving being threatened and assaulted in her home to . . . the [LASD]." As the court observed during the sidebar conference, and as the prosecutor noted during closing argument, Avila broke down, trembled and cried incessantly during her testimony.

b. Forfeiture

Respondent argues appellants forfeited their Evidence Code section 352 arguments by failing to raise the objections at trial. Questions regarding the admissibility of evidence are generally not reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186; see also Evid. Code, § 353.) "[T]o the extent [appellant] asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable [on appeal]." (*People v. Partida* (2005) 37 Cal.4th 428, 438.) "In the absence of an objection based on Evidence Code section 352, or a specific request for the court to exercise the discretion granted it by that section, . . . the trial court was not required 'to

make *sua sponte* an affirmative finding on the record to the effect that the probative value of the proffered evidence outweigh[ed] its prejudicial effect.”” (*People v. Smith* (1984) 151 Cal.App.3d 89, 97.) A relevance objection is insufficient to preserve a challenge under Evidence Code section 352. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1130.)

Here, counsel for Jose and Hector objected to the evidence of witness intimidation on various state and federal bases. At no time, however, did counsel assert a Evidence Code section 352 objection or argue that the risk of prejudice outweighed the relevance of the proffered evidence. For these reasons, Jose’s claim is forfeited. Robles’s claim is forfeited for his conceded failure to object or to join the objections made by Jose and Hector. (*People v. Wilson* (2008) 44 Cal.4th 758, 793.)

5. Instructional error

When the jury instructions were being discussed, Jose’s counsel objected to CALCRIM No. 371, stating, “I don’t think there has been any evidence that any of the defendants tried to hide any evidence.” The prosecutor reminded the court that evidence had been offered that Hector tried to hide evidence by washing blood off his shoes, and that Robles’s sister had been asked to get rid of Hector’s pants. Jose’s counsel objected to the instruction being given as to Jose. The court overruled Jose’s objection, noting that the wording of CALCRIM No. 371 is subjunctive.

Jose asserts that the trial court erred by giving an unmodified version of CALCRIM No. 371 over counsel’s objection.²² He argues that the unmodified

²² The instruction, as given, states:

“If any of the defendants tried to hide evidence or authorized another person to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that any of the defendants made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.

“If you conclude that a defendant tried to hide evidence, or authorized another person to hide evidence, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty.”

instruction did not apply to him because “there was not a shred of evidence that [he] ever tried to hide anything,” and insists the instruction was misleading “because it tempted the jury to find that since Hector . . . or . . . Robles hid evidence, Jose probably did so too, and that was evidence of Jose’s guilt.” Robles joins this argument.²³ These assertions lack merit.

First, the record contains substantial evidence that, at a minimum, Jose authorized another person to hide evidence when he told Hector to “get rid of” the clothing on which Hector said there was blood. The jury could reasonably infer that Jose’s admonition to Hector supported a consciousness of his own guilt sufficient to support the giving of CALCRIM No. 371 as to Jose.

Second, even if the record lacked substantial evidence that Jose hid or sanctioned the hiding of evidence, his assertion would fail. As the trial court observed, the instruction states that, “If you conclude that *any* of the defendants made such an attempt [to hide evidence] it is up to you to decide its meaning and importance.” The instruction also states, “If you conclude that *a defendant* tried to hide evidence or authorized another person to hide evidence you may consider that conduct *only against that defendant*. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty.” (Italics added.)

These directives are clear. We reject Jose’s assertion that the instruction “tempted the jury to find that since Hector . . . or . . . Robles hid evidence, Jose probably did so too” As observed above, jurors are presumed to understand and follow the court’s instructions. (*People v. Carey, supra*, 41 Cal.4th at p. 130.) Accordingly, we reject the claim.

²³ Robles joins Jose’s argument notwithstanding the fact Jose asserts that the instruction was properly given as to Robles, as to whom Jose contends the record contains evidence which would support a finding that he hid evidence. Robles’s claim is forfeited for failure to object at trial. (*People v. Wilson, supra*, 44 Cal.4th at p. 793.)

6. *Substantial credible evidence supports appellants' convictions*

Appellants contend the evidence at trial came from (1) uncorroborated testimony of a probable accomplice who willingly drove one getaway car, (2) a dishonest, vengeful informant who cut a favorable deal in exchange for his testimony, and (3) the unreliable account of a victim whose description of the man who robbed him is at odds with Jose's physical characteristics. They maintain the guilty verdicts must be set aside because there is insufficient credible evidence to establish their guilt beyond a reasonable doubt, and sustaining their convictions denies them a fair trial and violates due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

a. Standard of review

When reviewing a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Appellants’ meritless challenge to the sufficiency of the evidence does not warrant lengthy discussion. First, they ask us to reweigh the evidence in the light most favorable

to their version of events by arguing, as they did to the jury, that Avila was an accomplice, that Saldana was nothing but a vengeful, untrustworthy snitch looking for his own best deal, and that Kemp's eyewitness identification of Jose was untrustworthy. That is not our function, nor is it the appropriate standard of review. (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

b. Avila

Appellants' attack on Avila's credibility must fail. A conviction may not be based on an accomplice's testimony, unless that testimony is corroborated by other evidence. (*People v. Hoover* (1974) 12 Cal.3d 875, 879.) To believe the witness was an accomplice, the jury was required to find that Avila aided the defendants and "acted with 'guilty knowledge and intent with regard to the commission of the crime.'" (*Ibid.*) On appeal, we must "resolve all inferences and inconsistencies in favor of the jury's implied finding that [Avila] was not an accomplice." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 962.)

There is evidence Avila did not know of any plan to commit the crimes, and that she did not participate in the congratulatory "high-fiving" afterward. She testified that she did nothing more than agree to drive Jose, and that she knew nothing of the murders until she saw the news. After she went to the police, Avila was assaulted and she and her family were threatened with violence by members of the Barrio 13 gang. Avila's trembling, crying and fearful behavior at trial demonstrated she took those threats seriously. On this evidence the jury could find that Avila's behavior was inconsistent with an accomplice who shared appellants' criminal intent. Any evidentiary discrepancies with regard to Avila's role were argued to the jury by defense counsel. It was for the jury, not this court, to resolve those inconsistencies. We do not reweigh evidence on appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

c. *Saldana*

As for Saldana, appellants correctly point out there was evidence from which the jury could have concluded he was a dishonest man with a lengthy history of criminal conduct of his own, who testified in exchange for a deal that benefited his family.²⁴ What they ignore, however, is an amplitude of contrary evidence offered, not just through Saldana, but by way of the trial testimony of two district attorney deputies, two LASD detectives and one deputy sheriff, each of whom corroborated Saldana's testimony that neither he nor his wife received a benefit in exchange for his testimony in this case. In addition, Saldana's credibility was bolstered by the fact that many details he provided about the charged crimes were not publicly available, and the jury could reasonably have concluded that he could only have learned those details from the defendants. As appellants acknowledge, the credibility of a witness is generally a question of fact for the jury. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)²⁵

d. *Kemp*

Finally, Kemp's identification of Jose was sufficient evidence from which a rational jury could find beyond a reasonable doubt that he was the man who robbed him at gunpoint. The identification of a single eyewitness is sufficient to prove a defendant's identity (*People v. Anderson* (2001) 25 Cal.4th 543, 570–575), even if that identification

²⁴ Saldana has an extensive criminal history, starting as a juvenile. In April 2009, after Hector tagged a police car, the LASD did a neighborhood sweep of every known gang member from Barrio 13. During that sweep deputies found a huge stash of marijuana, arrested Saldana and his wife, and removed their children from the house. Saldana was angry with the gang for instigating the sweep. In a Evidence Code section 402 hearing outside the jury's presence, he testified that he wanted revenge on the defendants because their actions resulted in the loss of his wife and children. He decided to tell the police about the triple homicide. He told the LASD to help him, and he would help them. Thirty minutes later his wife was released from custody.

²⁵ Appellants argue that Saldana's testimony is not credible, in part, because he wanted revenge against appellants after he and his wife were arrested and their children were detained by DCFS. But the testimony on which they rely to support this assertion was given during an evidentiary hearing outside the jury's presence.

is not entirely free of inconsistencies (*People v. Martinez* (1969) 206 Cal.App.2d 809, 812).

Further, Kemp's testimony was corroborated by Saldana, who testified that Jose boasted about robbing a black man he encountered while he stood lookout at Williams's apartment. The jury could reasonably conclude that Kemp was the person Jose described. In any event, we reject appellants' attempt to point out inconsistencies in Kemp's testimony, or to suggest that defective pretrial identification procedures rendered his testimony unreliable, as nothing more than a veiled request to reweigh the evidence. The jurors assessed Kemp's credibility, determined the weight to be given his testimony, and resolved any conflicts and inconsistencies between his pretrial identifications and his testimony at trial. (*People v. Martinez, supra*, 206 Cal.App.2d at pp. 812–813.) Substantial evidence supports appellants' convictions.²⁶

7. Additional motive for commission of crimes does not negate gang enhancement

Appellants, who do not dispute that they or Hector are members of the Barrio 13 gang, maintain that the gang enhancements must be stricken because “the evidence disclosed that the sole intent behind the crime was to bail out the Prieto brothers' mother, not to benefit the gang.” This assertion fails. Even if appellants were motivated to raise bail money, their personal motives do not detract from or negate their additional motive of conferring a benefit to their gang.

The same principles discussed above, regarding appellate challenges to the sufficiency of the evidence, apply to enhancement prosecutions under section 186.22, subdivision (b). (*In re Jose P.* (2003) 106 Cal.App.4th 458, 465–466.) We consider the evidence in a light most favorable to the judgment and presume the existence of every

²⁶ Our resolution of appellants' prior assertions makes it unnecessary to address their contention that cumulative error deprived them of a fair trial and constituted a miscarriage of justice. All of appellants' claims of error either lack merit or, to the extent error occurred, it was harmless. Appellants cannot demonstrate a cumulative effect from any errors. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 435–436.)

fact the jury could reasonably deduce from the evidence. (*People v. Zamudio, supra*, 43 Cal.4th at p. 357.)

Appellants challenge the sufficiency of the evidence to support the jury's true finding on the gang enhancement. They argue the evidence does not show they harbored the specific intent "to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).) They insist the clear reason for the crimes was their desire to raise bail money, not to benefit their gang.

Appellants conflate the "benefit" and "specific intent" prongs of section 186.22, subdivision (b)(1). The enhancement requires the prosecution to prove two elements: "first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the specific intent to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members." (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358, italics omitted.) The disjunctively worded subparts of each element provide separate and alternative means to satisfy the two statutory elements. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162.)

The prosecution need not establish the underlying felony benefits the gang. The jury can "reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).) *Morales* also explains, "specific intent to *benefit* the gang is not required," but instead "specific intent to promote, further, or assist in any criminal conduct by gang members" (*Ibid.*) The enhancement only applies if the individuals associate "together as gang members." (*Albillar, supra*, 51 Cal.4th at p. 62, italics omitted.) But that may be inferred where they rely on their mutual gang affiliation or work in concert with other gang members. Citing coordination among gang members, the gang expert in *Morales* explained that the gang crimes there "involved three gang members acting in association with each other. The gang provided 'a ready-made manpower pool' That is, one gang member would choose to commit a crime in association with other gang members because he could

count on their loyalty. They would ‘watch his back’ In addition, the very presence of multiple gang members would be intimidating. The crime would benefit the individual gang members with notoriety among the gang, and the gang with notoriety among rival gang members and the general public.” (*Morales, supra*, 112 Cal.App.4th at p. 1197.)

Appellants’ assertion that the prosecution was required to prove specific intent to benefit a gang also lacks merit. Section 186.22, subdivision (b)(1) requires only “the specific intent to promote, further, or assist criminal conduct by gang members.” (*Albillar, supra*, 51 Cal.4th at p. 67, italics omitted; see also *Morales, supra*, 112 Cal.App.4th at p. 1198 [“specific *intent* to benefit the gang not required”].) Appellants argue that the crimes were intended to benefit the Prieto brothers’ mother, and that the desire to bail her out precludes a conclusion that the crimes had any additional motive to benefit the gang. “[T]o presume, as defendants urge, that family ties necessarily predominate over gang affiliation when gang members who are related commit crimes together would substantially eviscerate the gang enhancement.” (*Albillar*, at p. 62.) The evidence that appellants committed the triple murders and robbery of Kemp in collaboration with Hector, and that all three defendants were members of the Barrio 13 gang was sufficient to satisfy the specific intent element of the gang enhancement, regardless of whether the crimes were also committed to raise bail money. Appellant’s arguments are without merit, and sufficient evidence supports the jury’s true finding on the gang enhancement. Further, Deputy Salgado explained that gang members gain respect and an elevated status as individual gang members and for their gang at large, in the community and among other gangs by committing crimes which instill fear in the community, especially when the crimes are particularly vicious, such as murder.

The evidence that appellants and Hector committed the crimes in collaboration with each other, taken together with Deputy Salgado’s expert testimony, was sufficient to support the jury’s finding that appellants’ crimes were committed with the specific intent to promote, further, or assist in criminal conduct by gang members. This is true irrespective of the possibility that appellants were also motivated to commit the crimes to

raise bail. Appellants simply chose to raise the bail money in a way that also benefited their gang. The challenge to the gang enhancements fails.

8. *Abstracts of judgment must reflect joint and several liability for restitution*

During sentencing the trial court ordered appellants to pay \$22,500 to the Victim's Compensation Fund, and total restitution sums of \$4,118.48 to the victims' families. It ordered that those fines be joint and several. The abstracts of judgment fail to reflect joint and several liability. Respondent appropriately concedes that the abstract of judgment must be corrected to state that appellants are jointly and severally liable for the restitution, in accordance with the court's oral pronouncement. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1070 [when in conflict, trial court's oral pronouncement of judgment prevails over abstract of judgment].)

9. *Modification of abstract of judgment as to Robles*

Robles correctly asserts that the abstract of judgment requires modification to reflect the correct firearm enhancement as to him. By its verdict, the jury found true the enhancement that a principal personally used a firearm under section 12022.53, subdivision (d), and the vicarious firearm use enhancement under section 12022.53, subdivision (e)(1). The minute order and abstract of judgment incorrectly reflect an enhancement as to Robles for section 12022.53, subdivision (d). Respondent concedes that the abstract requires modification to correct this legal error. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) We will direct the trial court to modify the judgment and issue a corrected abstract of judgment.²⁷

²⁷ Jose, whom the trial court observed was an "actual firearm user" in the robbery of Kemp, appropriately refrains from joining Robles's argument on this point. (Cf., *People v. Mason* (2002) 96 Cal.App.4th 1, 11–14 [when murder occurs in the course of multiple robberies, all counts are subject to § 12022.53, subd. (d) enhancement].)

DISPOSITION

The trial court is directed to modify the judgment and issue a corrected abstract of judgment to reflect that Jose Prieto is jointly and severally liable with Jesse Robles to pay the Victim's Compensation Fund and victims' families total restitution sums of \$26,618.48. With respect to Jesse Robles, the trial court is directed to modify the May 20, 2011 minute order to reflect that the sentence enhancements imposed as to counts 1, 2 and 3 are imposed pursuant to Penal Code section 12022.53, subdivision (e)(1). The court is further directed to issue a corrected abstract of judgment for Jesse Robles to reflect that the: (1) sentence enhancements imposed as to counts 1, 2 and 3 are imposed pursuant to Penal Code section 12022.53, subdivision (e)(1), and (2) Jesse Robles is jointly and severally liable with Jose Prieto to pay the Victim's Compensation Fund and victims' families total restitution sums of \$26,618.38. The court is directed to forward certified copies of each corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.